

Northwestern Journal of Law & Social Policy

Volume 2
Issue 1 *Summer*

Article 4

Summer 2007

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Recommended Citation

Rob Wilcox, *Housing in Post-Katrina New Orleans: Legal Rights and Recourses for Displaced African-American Residents*, 2 Nw. J. L. & Soc. Pol'y. 105 (2007).
<http://scholarlycommons.law.northwestern.edu/njlsp/vol2/iss1/4>

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Housing in Post-Katrina New Orleans: Legal Rights and Recourses for Displaced African-American Residents

Rob Wilcox*

I. INTRODUCTION

¶1 Hurricane Katrina dramatically changed the lives of more than one million Americans, evoking passion and tension around the nation. Katrina's devastating impact has left hundreds of thousands of Americans without adequate shelter and without a guaranteed prospect for shelter.¹ Rebuilding New Orleans will take years, and a pressing question is for whom the city will be rebuilt. New Orleans flooded because the federal and municipal government failed to fulfill their promise to build and maintain a viable levee system.² Currently, the city is facing extreme racial tension and could be facing a major racial and economic transformation.³ The city may shrink its city limits or footprint, effectively excluding former residents.⁴ This Comment will establish that any reduction of the city's footprint that has a disproportionate impact on African-American residents will violate the federal Fair Housing Act (FHA).⁵

¶2 The stated goal and hope of the rebuilding effort is to rebuild New Orleans for all interested residents.⁶ This Comment will address an alternative scenario—a plan for New Orleans that excludes vast numbers of African-American residents who want to return, dramatically altering the city's racial makeup. All of the residents relied on the government to protect them from flooding; it is unfair to subject only African-American residents to relocation after the government failed to keep its promise. The FHA can protect African-American residents from public officials and private developers whose decisions have a disparate impact on the African-American community. African-American residents who would be displaced through rebuilding can ask a federal court,

* I would like to thank the Northwestern Journal of Law and Social Policy staff, Professor Len Rubinowitz, and my lovely wife, Jessa DeSimone.

¹ See generally *A Vision and Strategy for Rebuilding New Orleans: J. Hearing Before the H. Comm. on Transp. & Infrastructure, Subcomm. on Econ. Dev., Public Bldgs. and Emergency Mgmt., Subcomm. on Water Resources and Env't.*, 109th Cong. (2005), available at <http://a257.g.akamaitech.net/7/257/2422/02oct20061230/www.access.gpo.gov/congress/house/pdf/109hrg/25915.pdf> [hereinafter *A Vision and Strategy for Rebuilding New Orleans*].

² John Warrick & Peter Whoriskey, *Army Corps is Faulted on New Orleans Levees*, WASH. POST, Mar. 25, 2006, at A6.

³ Ann M. Simmons, *Racial Current Runs Through This Campaign*, L.A. TIMES, Apr. 17, 2006, at A4.

⁴ Gordon Russell, *Officials Tiptoe Around Footprint Issue*, NEW ORLEANS TIMES-PICAYUNE, Jan. 8, 2006, at 1.

⁵ 42 U.S.C. § 3601 (2000).

⁶ President George W. Bush, President Discusses Hurricane Relief in Address from the City of New Orleans Shortly After Hurricane Katrina (Sept. 15, 2005), available at <http://www.whitehouse.gov/infocus/katrina/archive.html>.

either under a declaratory judgment act or after plans have been released, to order that the rebuilding plan not violate the anti-discrimination principals of the FHA.

Former residents who lost their homes must have the means to secure the housing that they both need and deserve. This Comment will begin with an overview of the city of New Orleans before the hurricane, and will then briefly touch on Hurricane Katrina's impact on the city. Next, it will examine the statutory rights vested in the FHA. This Comment will then analyze FHA jurisprudence in multiple jurisdictions, examining theories behind past FHA claims, the legal standards established in those cases, how plaintiffs were able to satisfy FHA standards, and the types of remedies historically provided by the legal system. After such legal and historical examination, this Comment will synthesize past case law with the unique facts at hand and propose a provocative remedy.

II. OVERVIEW OF NEW ORLEANS BEFORE HURRICANE KATRINA

A. Population

New Orleans is a city with a distinct racial makeup. The New Orleans metropolitan area consists of seven parishes and has a total population of just over 1.3 million people, making it the fifty-fourth largest metropolitan area in the country.⁷ The 2000 Census, the last census prior to Hurricane Katrina, reported that the city of New Orleans had 485,000 residents, and was the thirty-first largest city in the country.⁸ The city's population consisted of 325,927 African-Americans (sixty-seven percent) and 135,956 whites (twenty-eight percent).⁹ There were 113,136 African-American households with forty-three percent of African-Americans owning their homes.¹⁰

The media coverage of the evacuation of New Orleans has reintroduced our country to racial segregation. The coverage after Katrina showed a city with deep racial divisions. However, the segregation in the city was not the result of hundreds of years of discrimination but was actually a more recent occurrence.¹¹ New Orleans has always had a high percentage of African-Americans, but until recently racial groups were not isolated by geographic boundaries.¹² The city's transformation took place over the past fifty years.¹³ By 2000, the average African-American resident in New Orleans lived in a neighborhood in which eighty-two percent of the population was African-American (a proportion that is considered "highly segregated").¹⁴

⁷ The seven parishes are Orleans (City of New Orleans), Jefferson, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, and St. Tammy; U.S. Census Bureau Census 2000, Summary File 1 (SF 1).

⁸ THE BROOKINGS INST. METRO. POLICY PROGRAM, NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE 4 (2005), available at http://media.brookings.edu/mediaarchive/pubs/metro/pubs/20051012_NewOrleans.pdf (citing U.S. Census Bureau, Census 2000) [hereinafter NEW ORLEANS AFTER THE STORM].

⁹ U.S. Census Bureau, Census 2000, SF 1 and Summary File 3 (SF 3) (2000).

¹⁰ THE BROOKINGS INST. METRO. POLICY PROGRAM, KEY INDICATORS OF ENTRENCHED POVERTY (2005), available at http://www.brookings.edu/metro/20050920_povertynumbers.pdf [hereinafter KEY INDICATORS].

¹¹ NEW ORLEANS AFTER THE STORM, *supra* note 8, at 5-6.

¹² *Id.* at 5 (citing PEIRCE LEWIS, NEW ORLEANS: THE MAKING OF AN URBAN LANDSCAPE (1976)).

¹³ *Id.* at 4.

¹⁴ *Id.* at 6.

¶6 Paralleling this segregation was the clustering of those living in poverty. Forty-three percent of poor African-Americans lived in areas of concentrated poverty, while only eleven percent of poor whites lived in such areas.¹⁵ The most striking example of this concentrated poverty is the Lower Ninth Ward, where there was a thirty-six percent poverty rate and high incidences of crime and violence.¹⁶ Public housing data shows that in 2005 there were 17,913 publicly subsidized housing units, all occupied by African-Americans.¹⁷ White flight in the form of urban sprawl, without the justification of high population density in existing developed land, presents one theory as to why race has become more concentrated.¹⁸

B. Economy

¶7 New Orleans has long struggled with economic depression, but it has the economic potential and vitality to draw workers, investors and industry back to the city. The cultural uniqueness of the city makes it a tourist destination. Also, the Port of New Orleans is the largest “through put” port in the United States,¹⁹ handling more than 430 million tons of cargo annually.²⁰ The area produces thirty percent of the crude oil and twenty percent of the natural gas produced in the United States.²¹ Additionally, forty billion barrels of oil reserves were recently discovered in the Gulf of Mexico.²² The coastal wetlands create a nursery for much of the nation’s seafood, with more than forty-five percent of the nation’s shrimp and thirty-five percent of the nation’s oysters being caught in the area.²³

¶8 Despite these economic opportunities, the city’s metropolitan area has an eighteen percent poverty rate, making it the sixth poorest out of the hundred largest metropolitan areas in 2000.²⁴ In 2000, the median household income was \$35,317—the fourth lowest out of the hundred largest metropolitan areas in the United States.²⁵ Job growth in the New Orleans metropolitan area has lagged behind national trends.²⁶ Non-farm employment in New Orleans increased by fifty-four percent from 1970 to 2000, while the national growth rate over the same period was eighty-seven percent.²⁷ Economic growth

¹⁵ ALAN BERUBE & BRUCE KATZ, *KATRINA’S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* 10 (The Brookings Institution 2005), available at http://www.brookings.edu/metro/pubs/20051012_Concentratedpoverty.pdf.

¹⁶ Gwen Filasam, ‘I Came to See What God Had Done,’ NEW ORLEANS TIMES-PICAYUNE, Oct. 28, 2005, at A1.

¹⁷ KEY INDICATORS, *supra* note 10.

¹⁸ NEW ORLEANS AFTER THE STORM, *supra* note 8, at 10.

¹⁹ *A Vision and Strategy for Rebuilding New Orleans*, *supra* note 1, at 68.

²⁰ Press Release, The Subcommittee on Water Resources and Environment and The Subcommittee on Economic Development, Public Buildings and Emergency Management to Hold Joint Hearing on *A Vision and Strategy for Rebuilding New Orleans* (on file with author) [hereinafter *Vision and Strategy* Press Release].

²¹ *Id.* at 56.

²² *Vision and Strategy* Press Release, *supra* note 20.

²³ *Id.*

²⁴ NEW ORLEANS AFTER THE STORM, *supra* note 8, at 4.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

opportunities exist in a number of industries, but New Orleans must be adequately rebuilt before tourism or other industries return.²⁸

III. HURRICANE KATRINA

¶9 While Hurricane Katrina devastated New Orleans on many levels, it also offers an opportunity to rebuild a city that had slipped into patterns of racial segregation and economic depression. In President Bush's speech to the nation after the hurricane, he stated that in New Orleans and surrounding parishes, it is no longer safe to live in more than a quarter million houses. This leaves hundreds of thousands of people who need to find longer-term housing.²⁹

¶10 A U.S. Representative from the affected region estimated that 228,000 occupied housing units had been flooded—more than forty-five percent of all usable housing.³⁰ A flooded structure can often be rehabilitated, but extensive damage to the foundation or support structure requires demolition.³¹ The storm damaged the city's most vulnerable areas, with thirty-eight of New Orleans's forty-nine extreme poverty census tracts flooded.³² It could cost up to \$61.5 billion to address the environmental impact of Katrina, with thirty-five billion dollars needed to restore the wastewater treatment infrastructure and nearly twenty-five billion dollars needed to assess and dispose of hazardous wastes.³³

¶11 Mtumishi St. Julien, Executive Director of the Finance Authority of New Orleans, stated that as of October 18, 2005, 40,000 people were still in shelters, another 150,000 were in hotels, and an additional 150,000 or more were staying with relatives.³⁴ "The city is virtually empty," he said.³⁵ The massive scale of the destruction in addition to the emptiness of the city will allow for city planners to focus on rebuilding a city that can withstand another Katrina, but could also lead to the exclusion of many of the city's former residents.

IV. REBUILDING

¶12 The government has responded to Katrina at the federal, state and local levels. On October 18, 2005, the Subcommittee on Water Resources and Environment and the Subcommittee on Economic Development, Public Buildings and Emergency Management held a joint hearing on "A Vision and Strategy for Rebuilding New Orleans."³⁶ The Subcommittees made clear that "to be effective, New Orleans and its

²⁸ *A Vision and Strategy for Rebuilding New Orleans*, *supra* note 1, at 54-55.

²⁹ President George W. Bush, *supra* note 6.

³⁰ *A Vision and Strategy for Rebuilding New Orleans*, *supra* note 1, at 11-12 (statement of Rep. William J. Jefferson). The 228,000 total includes 120,000 owner-occupied units and 108,000 units occupied by renters.

³¹ Vision and Strategy Press Release, *supra* note 20.

³² *Id.* The U.S. census bureau defines census tracts as small, homogenous, relatively permanent statistical subdivisions of a county averaging about 4,000 inhabitants.

³³ 36 Env't Rep. (BNA) 1889, 1916 (2005).

³⁴ *A Vision and Strategy for Rebuilding New Orleans*, *supra* note 1, at 199 (statement of Mtumishi St. Julien, Executive Director, The Finance Authority of New Orleans).

³⁵ *Id.*

³⁶ *Id.* at I.

citizenry will have to create a comprehensive plan for the rebuilding effort, including clear long-term goals, public participation and measurable outcomes.”³⁷ New Orleans Mayor C. Ray Nagin announced the formation of the “Bring New Orleans Back Commission” on September 30, 2005, the same day the New Orleans City Council said it would form its own advisory commission.³⁸ Louisiana Governor Kathleen Blanco also created a twenty-four member commission, the Louisiana Recovery Authority, which will focus on the rebuilding of South Louisiana.³⁹ Although legislative and administrative bodies have been formed, there are pressing questions about the government’s role, as well as the need for a concrete rebuilding plan.

A. *Government’s Role after Prior Disasters*

¶13 The government will have an active role in the rebuilding process. The 1906 fire in San Francisco, California and the 1900 hurricane in Galveston, Texas, provide two of the more recent examples of the necessary partnership between government and the private sector when an entire community is destroyed.⁴⁰ In each case, government money made up only a portion of the total expenses, while most of the rebuilding was done by private individuals.⁴¹ The government played a major role in ensuring public safety by taking decisive and tangible steps that provided an essential public reassurance to traumatized citizens and focused on creating a level playing field.⁴² However, in response to a more recent natural disaster, the government did not provide adequate, integrated housing.⁴³ The government’s response to Hurricane Charley has failed to provide adequate relief or opportunity for the most vulnerable among those affected, leaving many of the hurricane’s victims in a government-run trailer park filled with drugs and crime and far from opportunity.⁴⁴

B. *Public Planning*

¶14 A number of legislative proposals and reports have been floated as possibilities for rebuilding the areas affected by Hurricane Katrina, and a few of those options are summarized below.

¶15 The states affected—Mississippi, New Orleans, and Alabama—will rely on the federal government to provide revenue, and large federal aid packages have already been passed.⁴⁵ In December 2005, Congress passed a \$29 billion aid package for the Gulf region.⁴⁶ The package gave Mississippi about five times as much per household in housing aid as it gave Louisiana—a testimony to the clout of Governor Haley Barbour of Mississippi, a former Republican National Committee chairman, and Mississippi Senator

³⁷ Vision and Strategy Press Release, *supra* note 20

³⁸ Gary Rivlin, *Divisions Appear with Storm Recovery Commission*, N.Y. TIMES, Oct. 30, 2005, at A29.

³⁹ *Id.*

⁴⁰ Anna Bernasek, *Blueprints from Cities that Rose from Their Ashes*, N.Y. TIMES, Oct. 9, 2005, at C3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Peter Wilkinson, *Welcome to Nowhere Pop. 1,062*, ROLLING STONE, Nov. 17, 2005, at 58.

⁴⁴ *Id.*

⁴⁵ Adam Nossiter, *A Big Government Fix-It Plan for New Orleans*, N.Y. TIMES, Jan. 5, 2006, at A1.

⁴⁶ *Id.*

Thad Cochran, chairman of the Appropriations Committee.⁴⁷ All of the affected states are currently lobbying the federal government for more funds. The “Bring New Orleans Back Commission” is playing a large part in the rebuilding effort and recently released a master urban plan to rebuild New Orleans.⁴⁸

¶16 Representative Richard H. Baker, a Republican from suburban Baton Rouge, is advocating for a housing recovery plan that would make the federal government the biggest landowner in New Orleans.⁴⁹ Representative Baker’s proposed Louisiana Recovery Corporation would spend as much as eighty billion dollars to pay off lenders, restore public works, buy large ruined chunks of the city, clean them up and then sell them back to developers.⁵⁰ Under the plan, the Louisiana Recovery Corporation would prevent citizens from defaulting on their mortgage payments by offering to purchase homeowners’ homes, at no less than sixty percent of the equity they held in the property before Hurricane Katrina.⁵¹ Property owners would not be required to sell their land, but such a sale would come with the option to purchase the property back from the corporation after the rehabilitation.⁵² The federal corporation would have nothing to do with the redevelopment of the land, with the plans being drawn up by local authorities and private developers.⁵³

¶17 Another plan relies on the pre-storm market value of homes. The plan would offer owners of flood-damaged houses a choice between a government buyout at full, pre-storm market value, or a renovation grant to cover most repairs.⁵⁴ If the administrators of the plan classify a house as “severely flooded”—meaning that the home took on roughly two feet of water or more—then the home owner would be eligible for a buyout at full pre-Katrina market value, minus any monies previously received in insurance.⁵⁵ When it comes to renovation grants, the government will distinguish between homeowners with flood insurance, and those without. Homeowners with flood insurance could receive a grant of up to eighty percent of the difference between their renovation costs and any insurance coverage, while homeowners without flood insurance—regardless of whether the homeowner lived in flood zone— could only receive, at most, a renovation grant that would cover sixty percent of the costs.⁵⁶

¶18 Louisiana Governor Kathleen Blanco’s main housing assistance bill would create the Louisiana Housing and Land Trust Corporation, “which would use billions of available federal dollars to provide home buyouts, loans and grants in devastated parishes.”⁵⁷ The bill is designed to “help homeowners rebuild and recover from the

⁴⁷ *Id.*

⁴⁸ See BRING NEW ORLEANS BACK COMMISSION URBAN PLANNING COMMITTEE, ACTION PLAN FOR NEW ORLEANS: THE NEW AMERICAN CITY (2006), available at <http://www.bringneworleansback.com/Portals/BringNewOrleansBack/Resources/Urban%20Planning%20Action%20Plan%20Final%20Report.pdf>.

⁴⁹ Nossiter, *supra* note 45, at A1.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Gordon Russell, Frank Donzo & Laura Maggi, *Buyout in Works*, NEW ORLEANS TIMES-PICAYUNE, Feb. 13, 2006, at A1.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Melinda Deslatte, *Blanco, Lawmakers Scramble to Wrap Up Work by Friday Session End*, ASSOCIATED

hurricanes and would minimize blighted neighborhoods and large tracts of abandoned, ruined housing.”⁵⁸ Most importantly, the federal government, speaking through Donald Powell, President Bush’s chief federal hurricane recovery adviser, indicated that it is “important that there be some ‘vehicle’ to spend the federal housing aid coming to Louisiana.”⁵⁹

¶19 Loren C. Scott, an emeritus economist at Louisiana State University, stated that Representative Baker’s plan is “probably one of the few last best hopes out there for people whose homes were flooded, and had no flood insurance.”⁶⁰ Professor Scott went on to say that “[w]ithout this kind of help, there’s a very large number of people who are just sunk.”⁶¹ The same can be said for the local buyout plan, since it mirrors Representative Baker’s plan in many ways.

¶20 Any rebuilding plan should be inspected for blatant and intentional efforts to exclude racial minorities as well as certain facially neutral techniques that may have substantial discriminatory effects.⁶² Louisiana State University Professor Craig Colten concluded that the previous design of New Orleans placed racial minorities in locations where flooding would have a greater impact.⁶³

C. Political Landscape

¶21 Public officials have painted the rebuilding effort as an opportunity to combat the social ills found in New Orleans.⁶⁴ Addressing the public from in front of the historic St. Louis Cathedral, President Bush stated:

When communities are rebuilt, they must be even better and stronger than before the storm. . . . As all of us saw on television, there is also some deep, persistent poverty in this region, as well. That poverty has roots in a history of racial discrimination, which cut off generations from the opportunity of America. We have a duty to confront this poverty with bold action. So let us restore all that we have cherished from yesterday, and let us rise above the legacy of inequality.⁶⁵

¶22 President Bush offered a pledge that the area hit by the hurricane will have the support of the federal government for “as long as it takes, to help citizens rebuild their communities and their lives.”⁶⁶ Furthermore, he stated that although there are important

PRESS, Feb. 17, 2006.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Nossiter, *supra* note 45, at A1.

⁶¹ *Id.*

⁶² See generally JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1081-82 (5th ed. 2002) (explaining that discriminatory effects can manifest as controls on minimum housing cost, minimum housing size, and minimum lot size; related techniques including prohibitions on mobile homes and multifamily houses).

⁶³ See CRAIG E. COLTEN, AN UNNATURAL METROPOLIS: WRESTING NEW ORLEANS FROM NATURE 77 (Louisiana State University Press 2005) (“With greater means and power, the white population occupied the better-drained sections of the city, while blacks typically inhabited the swampy ‘rear’ districts.”).

⁶⁴ See generally President George W. Bush, *supra* note 6; *A Vision and Strategy for Rebuilding New Orleans*, *supra* note 1.

⁶⁵ President George W. Bush, *supra* note 6.

⁶⁶ *Id.*

decisions and many details to resolve, some “clear principles” have been established.⁶⁷ President Bush promised that the federal government will be “fully engaged in the mission,” but that “Governor Blanco, Mayor Nagin and other state and local leaders will have the primary role” in planning the rebuilding.⁶⁸

¶23 Some local officials have taken notice of the need to assure protection against rebuilding plans that would have a discriminatory effect. At a “Bring New Orleans Back” Commission meeting, Commissioner Oliver Thomas asked his fellow commissioners to commit formally to rebuilding the Ninth Ward—an impoverished, largely African-American and heavily damaged area.⁶⁹ Commissioner Thomas's resolution passed unanimously without debate, with one abstention.⁷⁰ However, the vote prompted both black and white commissioners to assess the wisdom of making commitments before they have had a chance to discuss an issue and its alternatives.⁷¹

¶24 Rebuilding and repopulating New Orleans becomes more urgent when one considers that other communities will be unwilling or unable to permanently accept an influx of displaced New Orleans residents. The Governor of Texas, Rick Perry, explained that there are currently no recognizable long-term housing solutions in his state.⁷² Governor Perry stated that Texas is incapable of supporting evacuees without a considerable increase in federal aid.⁷³ At the Congressional Subcommittee hearing, Mayor Nagin stated that New Orleans can get back up to 300,000 or 350,000 people with the help of the Federal Emergency Management Agency (FEMA), but beyond that, the city will need major housing loans and other help.⁷⁴ President Bush urged that communities move decisively to change zoning laws and building codes, in order to avoid a repeat of the disaster when the city is rebuilt.⁷⁵ However, in his speech he referenced “clear principles” that will guide the rebuilding effort,⁷⁶ and one of those principles must be rebuilding without discriminating against the African-American community of New Orleans.

V. THE FAIR HOUSING ACT

A. Goals & Purposes

¶25 The Civil Rights Act of 1968, commonly known as the Fair Housing Act (FHA), staked out a beachhead against discrimination and segregation in housing.⁷⁷ Residents of New Orleans will find shelter under the umbrella of the FHA if the federal, state or local

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Rivlin, *supra* note 38.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Eric Lipton, *Hurricane Evacuees Face Eviction Threats at Both Their Old Homes and New*, N.Y. TIMES, Nov. 4, 2005, at A20 (“Our communities cannot be expected to support such a large evacuee population on a long-term basis without substantial federal aid.”).

⁷³ *Id.*

⁷⁴ Edward Epstein, *Congress’ Role After Storm Debated*, S.F. CHRON., Oct. 19, 2005, at A6.

⁷⁵ President George W. Bush, *supra* note 6.

⁷⁶ *Id.*

⁷⁷ Fair Housing Act, 42 U.S.C. § 3604(b) (2000).

governments attempt to rebuild New Orleans in a way that has a discriminatory impact on African-Americans.

¶26 The language and interpretations of the Act provide bite to the grand principal that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁷⁸ The key section prohibits discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”⁷⁹

¶27 The Supreme Court of the United States has not explicitly interpreted the breadth, depth and scope of the FHA, but has, at times, discussed its purposes and goals. One important decision, *Trafficante v. Metro Life Insurance Co.*, did not interpret the substance of the Act, but did state that the FHA is governed by broad and inclusive purposes.⁸⁰ The Court identified the “benefits from interracial association,” and did not limit standing to only those at whom discrimination is aimed.⁸¹ The Court held that the FHA protects individuals if discrimination affects their daily lives.⁸² The Court ended its discussion with the hope that the FHA will “replace the ghettos ‘by truly integrated and balanced living patterns.’”⁸³ Lower courts have relied on statements that fair housing is “more important than jobs, and even more important than equal protection under the law,” as well as the lofty instruction that “we must turn our face away from a course of segregation and separation.”⁸⁴

¶28 While the FHA has panoply of features, Section B will explore how the FHA has specifically been used when governments have made decisions that have a discriminatory racial impact.

B. Disparate Impact Claims

¶29 The Federal Circuits agree that a successful FHA claim can be made by showing that a government decision has or will have a discriminatory impact on a protected class.⁸⁵ The judiciary will act to remedy a flawed housing situation or program after the plaintiff or class is able to show that the decision has a substantial discriminatory impact.⁸⁶ FHA claims can be brought against government or private actors and a court’s analysis differs depending on who the defendant is.⁸⁷ Residents and evacuees of New Orleans will be able to bring suit against the federal government, the government of New

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ 409 U.S. 205, 209-14 (1972).

⁸¹ *Id.* at 211 (noting that “[t]he person on the landlord’s blacklist is not the only victim” of discrimination, the Court was referring to the statement of FHA supporter Senator Javits, who emphasized that discrimination harms the “whole community”).

⁸² *Id.* (quoting *Shannon v. U. S. Dep’t of Hous. and Urban Dev.*, 436 F.2d 809, 818 (3d Cir. 1970)).

⁸³ *Id.* (quoting Senator Walter Mondale, 114 CONG. REC. 2706, 3422 (1968)).

⁸⁴ *NAACP v. Sec. of Hous. & Urban Dev.*, 817 F.2d 149, 158 (1st Cir. 1987) (quoting Senator Javits’s and Representative McCormack’s statements made during Congressional debates over the FHA, 114 CONG. REC. 2275, 2703 & 9616).

⁸⁵ *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986) (and cases cited therein).

⁸⁶ *Id.*

⁸⁷ Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 435-43 (1998).

Orleans, or the private developers contracted to rebuild the city.⁸⁸ However, this Comment focuses entirely on a potential plaintiff's remedies in the face of a governmental decision that has a disparate impact.

¶30 Before analyzing the different circuits' handling of FHA cases, it is important to distinguish an FHA analysis from an equal protection analysis. The equal protection "impact plus" standard developed in *Arlington Heights I*,⁸⁹ which requires a showing of discriminatory intent, is not the proper test for an FHA claim, which only requires a showing of a discriminatory effect.⁹⁰ After the Supreme Court rejected the plaintiffs' equal protection claim in *Arlington Heights I*, the Seventh Circuit on remand decided *Arlington Heights II*, where it found a valid cause of action under the FHA.⁹¹

¶31 FHA jurisprudence has never dealt with such a large housing program; most claims focus on a single building, a discrete housing project or a specific zoning decision. This section will synthesize a number of Federal Circuit Courts of Appeals' FHA decisions to demonstrate that a claim brought against the entire New Orleans rebuilding effort fits within the scope of the FHA. By examining a number of FHA cases, it becomes clear that although the FHA has never been applied to a citywide project or decision, the collection of FHA actions adds up to a metropolis worth of action. This section will initially look to the Fifth Circuit, a New Orleans resident's appropriate forum, before examining cases that have come from the First, Second, Third, Fourth, Seventh, and Eighth Circuits.

1. The FHA in the Fifth Circuit

¶32 The Fifth Circuit is the appropriate forum for a New Orleans resident to bring an FHA claim. Unfortunately, the Fifth Circuit has not decided many cases under the FHA, so it lacks the full and vibrant jurisprudence necessary to guide a complex analysis.⁹² The available case law indicates, however, that the Fifth Circuit is generally in agreement with other Circuits on the basics—an FHA plaintiff need only show a discriminatory effect to be successful.

¶33 A 1986 case, *Hanson v. Veterans Administration*, stands for the principle that a violation of the FHA would be established not only by proof of discriminatory intent, but through the showing of a significant discriminatory effect on a protected class.⁹³ The *Hanson* Court's brief analysis of the FHA cited a Sixth Circuit case, *Arthur v. City of Toledo*, with an affirmative nod towards the cases cited by that court in support of the discriminatory effect test.⁹⁴ In *Hanson*, the court reviewed statistical studies produced by the plaintiffs and concluded that the district court's decision was not clearly erroneous in

⁸⁸ See generally *id.*

⁸⁹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp. (Arlington Heights I)*, 429 U.S. 252, 266-67 (1977).

⁹⁰ *Metro. Hous. Dev. Corp. v. Village of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283, 1290 (7th Cir. 1977).

⁹¹ *Id.*

⁹² But see *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Hanson v. Veterans Admin.*, 800 F.2d 1381 (5th Cir. 1986); *Woods-Drake v. C.L. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982).

⁹³ 800 F.2d at 1386.

⁹⁴ *Id.* at 1386 (relying on *Arthur v. City of Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) (and cases cited therein)).

finding plaintiff's evidence insufficient to establish discriminatory effect.⁹⁵ Although the plaintiffs in *Hanson* did not present enough evidence to meet their burden, the court stated that statistical evidence alone, if convincing, is sufficient to meet the burden imposed under the FHA.⁹⁶ The Fifth Circuit's case law does not indicate that the FHA contemplates a claim against an entire city's building plan; the following analysis, however, will demonstrate that decisions from other circuits point to this conclusion.

2. The FHA Four Factor Analysis: *Arlington Heights II*

¶34 A landmark case in FHA jurisprudence occurred on remand from the United States Supreme Court.⁹⁷ In *Arlington Heights II*, the Seventh Circuit dismissed the plaintiff's equal protection claim, while holding there was a valid FHA claim, differentiating the two causes of action.⁹⁸ The court established four analytical factors that measure whether the FHA has been violated.⁹⁹ The Seventh Circuit examined: (1) the strength of the plaintiff's showing of discriminatory effect, (2) whether there was any evidence of discriminatory intent, (3) the government's interest in taking the action complained of, and (4) whether the plaintiff seeks to compel affirmative action or just to restrain the defendant from interfering with market forces.¹⁰⁰ Although discriminatory intent was a factor, the court held that it was the least important of the four, and is inversely related to the strength of the plaintiff's showing of discriminatory effect.¹⁰¹

¶35 The Seventh Circuit stated that a discriminatory effect inquiry asks two separate questions—first, whether the government's decision has had a greater adverse impact on one racial group over another, and second, what effect the government's decision has had on the required community interest of integration.¹⁰² The Seventh Circuit addressed the second question as completely independent from the first.¹⁰³ The district court approved a decision made by the Village of Arlington Heights to deny a rezoning request since it was based on a desire to protect property values and maintain the prevailing zoning plan.¹⁰⁴ The Seventh Circuit reversed, finding that even without a showing of discriminatory intent, the ultimate effect of the rezoning denial could be racially discriminatory.¹⁰⁵

¶36 Municipalities acting within their scope of authority are given more deference than private citizens, but are not allowed to systematically deprive minorities of housing opportunities simply by using a racially neutral ordinance or instrument.¹⁰⁶ District courts located in the Seventh Circuit are instructed to use a “statistical, effect-oriented

⁹⁵ *Id.* at 1388-90.

⁹⁶ *Id.* at 1390.

⁹⁷ *Metro. Hous. Dev. Corp. v. Village of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283 (7th Cir. 1977).

⁹⁸ *Id.* at 1290.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1292.

¹⁰² *Id.* 1290.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1286.

¹⁰⁵ *Id.* at 1290.

¹⁰⁶ *Id.* at 1293.

view of causality” when determining the effects of a housing decision.¹⁰⁷ A governmental entity is liable if the plaintiff can prove that the foreseeable consequences of a government act or omission adversely affects a protected class and if the action perpetuates racial segregation.¹⁰⁸

¶37 The Seventh Circuit established a useful four-factor analysis and clarified the distinction between an equal protection and FHA analysis.¹⁰⁹ Furthermore, the court allowed the omission of an act, in this case the refusal to rezone a tract of land, as grounds for an FHA claim.¹¹⁰

3. Refusing to Change Zoning Laws

¶38 The Eighth Circuit decided an early FHA case, and the principles it espoused have become a guiding force in FHA jurisprudence.¹¹¹ The Eighth Circuit held that the plaintiff was only required to prove that the government’s conduct “actually or predictably results in racial discrimination.”¹¹² The United States brought an action under the FHA to challenge a City of Black Jack zoning ordinance preventing new construction of multifamily homes.¹¹³ The case focused on a municipal zoning ordinance and the effect the ordinance would have on African-Americans.¹¹⁴ The district court found for the City of Black Jack, holding that the ordinance had no greater effect on African-Americans than whites. The court specifically found that the proposed housing development—meant for families earning between \$5,000 and \$10,000—was designed to meet the needs of thirty-two percent of the African-American population and twenty-nine percent of the white population.¹¹⁵

¶39 The Court of Appeals found this decision to be in error because the lower court failed to account for either the “ultimate effect” or the “historical context” of the city’s action.¹¹⁶ The Court of Appeals examined the housing statistics throughout the metropolitan area even though the case only considered a discrete ordinance.¹¹⁷ In doing so, the Court of Appeals found that the ordinance affected eighty-five percent of African-Americans living in the metropolitan area at a time when forty percent of the African-Americans in the metropolitan area were living in “substandard or overcrowded units.”¹¹⁸

¶40 The discriminatory effect of the ordinance became more “onerous” when the court assessed it in light of the history of segregated housing.¹¹⁹ The Court of Appeals viewed the zoning decision as “but one more factor confining blacks to low-income housing.”¹²⁰

¹⁰⁷ *Id.* at 1288-89.

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* at 1288-90.

¹¹⁰ *See id.* at 1288.

¹¹¹ *United States v. City of Black Jack, Mo.*, 508 F.2d 1179 (8th Cir. 1974).

¹¹² *Id.*

¹¹³ *Id.* at 1181.

¹¹⁴ *See id.* at 1186.

¹¹⁵ *Id.*

¹¹⁶ *Id.* (citing *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 810 (5th Cir. 1974); *Kennedy Park Homes Ass’n v. City of Lackawanna*, 436 F.2d 108, 112 (2d Cir. 1970)).

¹¹⁷ *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1186 (8th Cir. 1974).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

Thus, the Eighth Circuit case law highlights that affirmative legislative zoning decisions, even when facially neutral, must be viewed for their “ultimate effects” on a protected class and in light of the “historical context.”¹²¹

4. Compelling the Construction of Public Housing

¶41 The Third Circuit in *Resident Advisory Board v. Rizzo* found that individuals eligible for low-income public housing had a successful action against the city of Philadelphia and the federal government for terminating construction on the Whitman Townhouse project.¹²² The court established a probative level of judicial review with little deference due to facially reasonable acts of the government.¹²³ The plaintiffs sought to compel the construction of the Whitman project—a project to be undertaken in a predominantly white neighborhood of Philadelphia.¹²⁴ The court determined that the failure to undertake this project had a “greater adverse effect on nonwhite people than on white people” based on three factors: (1) the project’s waiting list was ninety-five percent minority, (2) the Whitman neighborhood had recently segregated racially, and (3) Philadelphia had a history of racial segregation.¹²⁵

¶42 The court considered historical context and found that the city, along with local and federal housing authorities, helped to transform an integrated neighborhood (in 1960, forty-six percent of the families were African-American) to one that was non-integrated (by 1970 there were virtually no African-American families in the area).¹²⁶ The court was very concerned with the rise in segregation and was willing to use its equitable power to order the city and housing authorities to proceed with construction.¹²⁷ The court concluded that “the Whitman project, when built and tenanted, would restore a measure of racial integration to an all-white portion of Whitman,” thus providing an opportunity to create an integrated, non-racially-impacted environment.¹²⁸ The government’s opposition to this project had the “undeniable effect of ‘bear[ing] more heavily on one race than another.’”¹²⁹

¶43 The court was careful to tailor the equitable relief to be no more intrusive than was necessary to remedy the specific FHA violation complained of.¹³⁰ The court of appeals overturned the district court’s order that the Philadelphia Housing Authority integrate all of Philadelphia’s public housing, because the plaintiffs had not requested that type of

¹²¹ *Id.* (citing *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 810 (5th Cir. 1974); *Kennedy Park Homes Ass’n v. City of Lackawanna*, 436 F.2d 108, 112 (2d Cir. 1970)).

¹²² 564 F.2d 126, 131-32 (3d Cir. 1977).

¹²³ *Id.* at 148 (“[T]he test for Title VIII liability, like that of Title VII, ‘involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.’”) (citing *Washington v. Davis*, 426 U.S. 229, 247 (1976)).

¹²⁴ *See id.* at 131-32.

¹²⁵ *Id.* at 143-44.

¹²⁶ *Id.* at 149.

¹²⁷ *See id.* at 149-50.

¹²⁸ *Id.* at 143.

¹²⁹ *Id.* (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp. (Arlington Heights I)*, 429 U.S. 252, 266 (1977)).

¹³⁰ *See id.* at 149.

remedy.¹³¹ The court did affirm the district court's order that the Whitman project be built, compelling action from the other branches of government.¹³²

¶44

The *Rizzo* case illustrates that the termination of a housing project may violate the FHA and that the judiciary possesses the equitable power to compel the actual construction of a building,¹³³ going beyond the administrative change in zoning law seen in *Huntington Branch, NAACP v. Town of Huntington*.¹³⁴ The court in *Huntington Branch* invalidated a municipal ordinance that restricted the development of private multifamily housing project—to be inhabited by minorities—to a largely minority urban renewal area and forbade the construction in a white neighborhood.¹³⁵ Under the FHA, a district court may compel the executive branch to act, as seen in *Rizzo*, or make what is traditionally a legislative decision, as seen in *Huntington Branch*.

5. Rebutting a Prima Facie Case

¶45

The First Circuit in *Langlois v. Abington Housing Authority* discussed two alternatives for rebutting a prima facie case of housing discrimination.¹³⁶ The First Circuit agreed with the district court that proof of discriminatory effect establishes a prima facie case.¹³⁷ However, the court disagreed with how the district court “balanced” the government’s justification for the discrimination against the effect of the discrimination.¹³⁸ The court juxtaposed the Seventh Circuit’s view that a court’s job is to balance the magnitude of discriminatory effect against the justification¹³⁹ with an alternative view that relied on a “simple justification test.”¹⁴⁰ The First Circuit held the government must demonstrate that “the disparate impact in housing [is] justified by a legitimate and substantial goal.”¹⁴¹ That court relied on a Supreme Court case¹⁴² and legislative history¹⁴³ to show that the government’s preference for local residents was substantial and served as proper rebuttal to the showing of a disparate impact.¹⁴⁴ It is noteworthy that the First Circuit had difficulty applying the HUD regulations requiring integrated housing in the rebuttal analysis.¹⁴⁵ The court referred to the analysis as presenting a “mare’s nest of problems” and only began to untangle the cobweb of HUD regulations that require local Public Housing Authorities to act affirmatively in providing fair housing.¹⁴⁶

¹³¹ *Id.* at 152-53.

¹³² *Id.* at 153.

¹³³ *Id.*

¹³⁴ 844 F.2d 926 (2d Cir. 1988).

¹³⁵ *See id.* at 937-38.

¹³⁶ 207 F.3d 43, 51-52 (1st Cir. 2000).

¹³⁷ *Id.* at 50.

¹³⁸ *Id.* at 50-51.

¹³⁹ *Id.* at 52 (citing *Metro. Hous. Dev. Corp. v. Village of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283, 1290-94 (7th Cir. 1977)).

¹⁴⁰ *Id.* at 52 (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148-49 (3d Cir. 1977) and *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939-40 (2d Cir. 1988)).

¹⁴¹ *Id.* at 52.

¹⁴² *Id.* at 51 (citing *County Bd. v. Richards*, 434 U.S. 5, 6-7 (1977)).

¹⁴³ *Id.* at 51 n.7 (citing 24 C.F.R. § 982.208(b) (1996)).

¹⁴⁴ *Id.* at 52.

¹⁴⁵ *Id.* at 53.

¹⁴⁶ *Id.* at 52-53.

6. Remedies

¶46 The Second, Third and Fourth Circuits present the various equitable remedies available to plaintiffs who succeed under the FHA.¹⁴⁷ The Third Circuit compelled the federal and local government to construct public housing and discussed the ability of the judiciary to order the desegregation of an entire public housing system.¹⁴⁸ The Second Circuit altered a zoning ordinance—traditionally a legislative function—to allow for private construction of low-income housing.¹⁴⁹

¶47 The Fourth Circuit articulated certain limits on the judicial power, restricting the ability to require affirmative action to specific circumstances.¹⁵⁰ In *Smith v. Town of Clarkson*, the Fourth Circuit used the *Arlington Heights II* four-factor analysis to find an FHA violation but overturned the district court’s order that required the town to construct fifty housing units.¹⁵¹ The court held that requiring the local government to spend local revenue was beyond the district court’s power, and that a district court could only order the construction to go forward under a “good faith” requirement, leaving open the possibility that unnecessary delays or stalling could be remedied by court order.¹⁵² The court, however, limited this restriction on a district court’s equitable power to the circumstances of the case and took care to stress that the local authority only had access to local monies, leaving open the possibility of a different result if federal funding was involved.¹⁵³

¶48 These three circuits illustrate the significant remedial powers that courts possess, especially when dealing with a municipality that receives significant federal assistance.

VI. NEW ORLEANS’ AFRICAN-AMERICAN RESIDENTS CAN FIND PROTECTION UNDER THE FHA

¶49 Hurricane Katrina damaged over a quarter of a million homes¹⁵⁴ and the participating government entities could decide to rezone, rebuild, buy out, or condemn homes or entire neighborhoods.¹⁵⁵ This decision would come on the heels of the government’s failure to keep its most important promise—to protect its residents.¹⁵⁶ The Army Corps of Engineers assured city leaders that the levees were strong, which in turn led the city to permit building in areas traditionally reserved as wetlands.¹⁵⁷ African-Americans populated the areas that were more vulnerable to flooding.¹⁵⁸ Shrinking the city’s footprint in order to restore the wetlands is permissible and maybe even advisable,

¹⁴⁷ *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 151 (3d Cir. 1977); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 941-42 (2d Cir. 1988); *Smith v. Clarkson*, 682 F.2d 1055, 1067-70 (4th Cir. 1972).

¹⁴⁸ *Rizzo*, 564 F.2d at 151.

¹⁴⁹ *Huntington Branch, NAACP*, 844 F.2d at 941-42.

¹⁵⁰ *Smith*, 682 F.2d at 1067-70.

¹⁵¹ *Id.* at 1069.

¹⁵² *Id.*

¹⁵³ *Id.* at 1069-70.

¹⁵⁴ *A Vision and Strategy for Rebuilding New Orleans*, *supra* note 1, at 11 (2005) (statement of Rep. William J. Jefferson).

¹⁵⁵ Russell, *supra* note 4, at A25.

¹⁵⁶ Warrick & Whoriskey, *supra* note 2, at A6.

¹⁵⁷ Paul Nussbaum, *New Orleans’ Growing Danger*, PHILA. INQUIRER, Oct. 8, 2004, at A14.

¹⁵⁸ COLTEN, *supra* note 63.

but that decision must conform to the anti-discriminatory principles of the FHA. The city could approach the shrinking of the footprint in a variety of ways. This shrinking might have an extraordinary impact on African-Americans by changing the city's racial makeup from one that is predominantly African-American to one that is predominantly white. In fact, the city has already begun to redevelop along those lines.¹⁵⁹

¶50 A hypothetical African-American plaintiff who has lost her place in the New Orleans footprint will be able to assert that she has suffered a concrete injury, namely the loss of her home. A more difficult question is whether the injury is causally connected to government action or more properly attributable to Katrina. While Katrina may have damaged or destroyed a person's home, it is the government that approved building within the city's footprint. Furthermore, once the government initiates a recovery plan, it is responsible for crafting a plan that complies with the FHA and does not have a discriminatory impact. If the plan affects a resident's housing options by either altering her neighborhood or displacing her from the city's footprint, then there will be a causal connection between that person no longer having a place to live within the New Orleans footprint and the specified government action.

¶51 Focusing on the potential footprint shrinking, the question remains whether the FHA is designed to cover the African-American residents excluded from the new footprint. Applying the FHA to the rebuilding of an entire city will exceed the scope of any prior FHA case, yet this does not mean that the FHA is inapplicable. FHA jurisprudence forms a mosaic that closely resembles the rebuilding of an entire city. Proving an FHA violation will require residents to show a substantial discriminatory effect¹⁶⁰ and more importantly, to show that the FHA is the proper legal instrument for vindicating their rights.

¶52 The FHA is the proper legal instrument, even with a project as massive as the rebuilding of an entire city. Past FHA cases have focused on discrete programs inside the microcosm of a metropolitan area, but when extrapolated, the case law resembles the rebuilding of an entire city. The cases examined thus far all had discriminatory effects, but the methods of discrimination were different. The Third Circuit illustrated that the executive department's termination of a housing project could violate the FHA.¹⁶¹ The Second Circuit overturned a decision not to change a zoning law because the failure to change the zoning law perpetuated segregation.¹⁶² The Eighth Circuit held that a legislative decision to change a zoning law, even if facially neutral, cannot have the ultimate effect of disparately impacting racial minorities.¹⁶³ This range of cases covers many of the possible government actions that may occur during the rebuilding.

¶53 An African-American resident of New Orleans displaced from the new footprint will be able to satisfy the substantive discriminatory effects test of the FHA and ask a court to construct a remedy. The proper substantive legal inquiries would be whether the government's decision has a greater adverse impact on one racial group over another and

¹⁵⁹ Doug Simpson, *Evacuees Return for New Orleans Vote*, ASSOCIATED PRESS, Apr. 10, 2006 ("New Orleans had nearly a half-million people, about 70 percent of them black, before Hurricane Katrina. Those who have returned number fewer than 200,000, and most are white.").

¹⁶⁰ *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996).

¹⁶¹ *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 131-33 (3d Cir. 1977).

¹⁶² *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938-42 (2d Cir. 1988).

¹⁶³ *United States v. City of Black Jack*, 508 F.2d 1179, 1181 (8th Cir. 1975).

what effect the government's decision has on the required community interest of integration (the perpetuation of the segregation issue).¹⁶⁴

¶54 The first inquiry, whether there is a disparate impact, requires the court to examine the entire footprint of New Orleans before and after Katrina. The alternative would be to examine the effect a single decision has on a discrete neighborhood. However, this would be improper because (1) the rebuilding decisions are made in concert and not in isolation, and (2) courts have traditionally looked outside the four corners of the affected area to determine impact.¹⁶⁵ Examining how the FHA applies to the rebuilding of an entire city may be easiest to understand when the rebuilding is broken into discrete projects. However, to fully understand the specific legal rights of African-American residents and to properly remedy their FHA claims, the project must be viewed as encompassing the entire New Orleans footprint prior to Katrina. Prior to Katrina, New Orleans had half a million residents and almost seventy percent of them were African-American.¹⁶⁶

¶55 Only when an individual's loss of housing is measured against the housing capacity for the entire city can the discriminatory effect be properly realized and remedied. The Eighth Circuit's examination in *City of Black Jack* represents the proper way to analyze an FHA question.¹⁶⁷ The Eighth Circuit widened the lens to examine how the decision to build housing in the City of Black Jack would affect the African-American population of the entire metropolitan area.¹⁶⁸ The court found that the ordinance affected eighty-five percent of African-Americans living in the metropolitan area, at a time when forty percent of the African-Americans in the metropolitan area were living in substandard or overcrowded units.¹⁶⁹ Similarly, a district court examining the rebuilding decisions being made in New Orleans should examine how the decisions affect the African-American population of the entire city and not simply one neighborhood. Looking at the rebuilding through that lens will allow the court to properly comprehend whether the shrinking of the footprint has a discriminatory effect. Any new footprint must have racial proportions that are similar to those from pre-Katrina New Orleans.

¶56 Similar circumstances on a smaller scale led to an FHA violation in the Fourth Circuit.¹⁷⁰ In *Betsey v. Turtle Creek Association*, the Fourth Circuit found an FHA violation when an apartment complex conversion to an all-adult policy had a substantially greater adverse impact on minority tenants.¹⁷¹ In making that determination, the court looked to how the policy affected the tenants subjected to it and found that the policy change would result in over fifty-four percent of African-Americans being evicted as opposed to only fourteen percent of whites.¹⁷² This type of analysis of a New Orleans footprint reduction plan could show similar results. If the results indicate a radical

¹⁶⁴ *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, (*Arlington Heights II*) 558 F.2d 1283, 1290 (7th Cir. 1977).

¹⁶⁵ *Black Jack*, 508 F.2d at 1186.

¹⁶⁶ U.S. Census Bureau, Orleans Parish QuickFacts, <http://quickfacts.census.gov/qfd/states/22/22071.html> (last visited May 22, 2007).

¹⁶⁷ 508 F.2d at 1186-88.

¹⁶⁸ *Id.* at 1186.

¹⁶⁹ *Id.*

¹⁷⁰ *Betsey v. Turtle Creek Ass'n*, 736 F.2d 983, 987 (4th Cir. 1984).

¹⁷¹ *Id.* at 985.

¹⁷² *Id.* at 989.

change in racial percentages with an adverse impact on African-Americans, then the same type of violation that occurred in *Betsey* would be found in New Orleans.

¶57 Depending on what balancing test is appropriate for rebutting a prima facie case, the government will either have to contend that the disparate impact on housing is justified by a “legitimate and substantial” goal¹⁷³ or show that the balance of the magnitude of discriminatory effect against the justification is in its favor.¹⁷⁴ The government could posit that in order to protect the city from a repeat of Katrina, it is necessary to scale the footprint back and rely on wetlands as a natural defense. Thus, the shrinking footprint’s disparate impact would be based on science and not on prejudice.

¶58 However, a reviewing court should follow the lead of the Eighth and Third Circuits by looking at the “historical context” when reviewing rebuilding decisions.¹⁷⁵ The historical context shows two prevailing conditions: first, the city was segregated, and second, African-Americans lived in the most dangerous portions of the city.¹⁷⁶ By 2000, an average African-American resident in New Orleans lived in a neighborhood in which eighty-two percent of the population was also African-American (a proportion that is considered “highly segregated”).¹⁷⁷ Moreover, Louisiana State University Professor Craig Colten concluded that the previous design of New Orleans placed racial minorities in locations where flooding would have a greater impact.¹⁷⁸ This context should color the rebuilding decisions in New Orleans in favor of African-Americans since there is an unfortunate history of both segregation and circumstances pointing to discriminatory intent.

¶59 As a defense, the government could also assert either that it is not preventing African-Americans from using the market to return to the new footprint or that it is providing more than adequate compensation in terms of buyout options for the displaced. Neither defense would rebut a prima facie FHA case since the issue is not whether African-Americans could return, but rather whether they are being displaced. Furthermore, the government’s defense would be comparing apples and oranges, as it is well known that the housing stock in the predominantly African-American neighborhoods is not as valuable as the housing stock in mixed or predominantly white neighborhoods. This disparity in wealth means that, even if African-American homeowners are compensated at one hundred percent of pre-Katrina value for their property, that income will be substantially less than the value of most property within a new footprint.

¹⁷³ *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51-52 (1st Cir. 2000).

¹⁷⁴ *Metro. Hous. Dev. Corp. v. Village of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283, 1290-94 (7th Cir. 1977).

¹⁷⁵ *United States v. City of Black Jack*, 508 F.2d 1179, 1182-83 (8th Cir. 1974); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977).

¹⁷⁶ COLTEN, *supra* note 63.

¹⁷⁷ NEW ORLEANS AFTER THE STORM, *supra* note 8, at 6 (citing ALAN BERUBE & BRUCE KATZ, *KATRINA’S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* (Brookings 2005)).

¹⁷⁸ COLTEN, *supra* note 63 (“With greater means and power, the white population occupied the better-drained sections of the city, while blacks typically inhabited the swampy ‘rear’ districts.”).

VII. REDISTRIBUTING HOUSING STOCK

¶60 The *Rizzo* case indicates that the judicial system is willing and able to invalidate massive housing projects so long as there is a discriminatory effect in the project's operation.¹⁷⁹ Examples of massive remedial plans can be found in the invalidation of state-wide educational systems—instances where the state court demands correction of the problem but does not mandate a specific performance.¹⁸⁰

¶61 Although New Orleans cannot shrink its footprint in a way that has a discriminatory impact, it can shrink its footprint. The city could either (1) redraw the footprint in a way that does not have a discriminatory impact or (2) redistribute the land within the footprint to include persons who would otherwise be excluded. The first option requires tactical but feasible line-drawing, but the second will take the raw exertion of governmental power and will appear much more controversial.

¶62 The second option would require the city to use its eminent domain and zoning powers simultaneously. To reduce the footprint fairly, the city would have to condemn areas and return them to wetlands while also seizing areas in the new footprint. The seized properties will most likely belong to whites, and the city would have to order their redevelopment and resale. This remedy goes to the heart of obligation. A person living inside the footprint has an obligation, embodied in the FHA, to make sacrifices in order for the city to rebuild equitably.

¶63 The plan may be unpalatable for some and may even be characterized as an unconstitutional quota system.¹⁸¹ However, this remedy is not based on granting homeownership rights to African-Americans simply because they are African-American. Rather, it is based on granting such rights because these African-Americans are former residents who are being discriminated against based on their race. This remedy sounds extreme since it will displace two families instead of one, but the racial scars in our history, which spawned the FHA, and Professor Colten's suggestion that African-Americans were intentionally placed in harm's way, both lead to the conclusion that subjecting one race to greater punishment because of the New Orleans government's failure to provide adequate levee protection would be unfair.

VIII. CONCLUSION

¶64 The rebuilding of New Orleans could take many years. There will be many difficult decisions to make before the city is rebuilt. In addition, there will come a point when mainstream America loses interest and political will demanding equality in the rebuilding process dissipates. Physics and topography may dictate that land use restrictions need to be implemented to protect future residents and the city itself from a repeat of the devastation caused by Katrina.¹⁸² However, the city deserves a thoughtful and fair rebuilding plan. New York Times columnist David Brooks pointed out that Katrina presents an opportunity to solve some of the social problems that have afflicted

¹⁷⁹ *Rizzo*, 564 F.2d at 130.

¹⁸⁰ See DANIEL R. MANDELKER ET. AL, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 827-828 (rev. 5th ed. 2003); Pauley v. Kelly, 255 S.E.2d 859, 883-84 (W. Va. 1979).

¹⁸¹ See Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003) (holding admission policies based on racial quotas unconstitutional).

¹⁸² Gary Rivlin, *All Parts of City in Rebuild Plan of New Orleans*, N.Y. TIMES, Jan. 8, 2005, at A18.

New Orleans by mimicking a *Gautreaux*-style¹⁸³ integrated rebuilding plan.¹⁸⁴ Residents affected by Katrina—especially those underserved during the recovery effort—need to feel confident that the rebuilding plan is centered on principles of inclusion, opportunity, and diversity.

¶65

In the unfortunate instance that the government creates a plan that has a disproportionate discriminatory effect, African-American residents will be able to use the FHA for protection. FHA cases taken from around the country demonstrate that although the FHA has not been used on such a wide scale before, it certainly can be. The residents do not have a right to housing in New Orleans, but if the city is rebuilt, the housing decisions must not, in the aggregate, have a discriminatory effect on African-Americans. If the political branches do not protect the interests of former residents, then the federal courts must intercede to demand that this be done.

¹⁸³ See generally *Hills v. Gautreaux*, 425 U.S. 284 (1976) (federal courts ordered federal and local housing authorities to create a metropolitan wide housing integration plan).

¹⁸⁴ David Brooks, Op-Ed., *Katrina's Silver Lining*, N.Y. TIMES, Sept. 8, 2005, at A29; see also LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 1-3 (2000).